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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JACQUELINE MICHELLE SCOTT,

Defendant and Appellant.

A123593

(Napa County
Super. Ct. No. CR140425)

Jacqueline Michelle Scott appeals her conviction for robbery with sustained allegations of two prison prior convictions (grand theft and kidnapping), for which the trial court sentenced her to a total prison term of seven years. Appellant attacks the sufficiency of evidence to sustain the finding that she used force or fear when acquiring the victim's property. Appellant also charges that the trial court lacked authority to order that she have no contact with the victim. The Attorney General concedes this error and asserts the order should be stricken from the judgment.¹ We conclude that substantial evidence supports the judgment and that the sentence should be modified to excise the protective order.

¹ The trial court issued a protective order of unknown duration, as it sentenced appellant to prison. There was no discernable statutory basis for the order and it was not entered pursuant to probation. If the court were rendering the order pursuant to its broad authority under Penal Code section 136.2, the order would be invalid because such orders are limited to the pendency of the criminal proceeding or to probation conditions, the statute's aim being to protect victims and witnesses. (*People v. Stone* (2004) 123 Cal.App.4th 153, 159.)

I. FACTS

A. *Procedural Summary*

By an amended information, the Napa County District Attorney charged appellant with kidnapping for extortion and robbery. The amended information also alleged two prior prison convictions and one prior strike conviction. The jury convicted appellant of robbery, but not of kidnapping. The court found true the prior prison convictions, granted a new trial as to the prior strike allegation, and then struck it upon the district attorney's advisement that the office was unable to proceed on the matter. The court sentenced appellant to the upper term of five years for the robbery, plus one consecutive year for each prior prison conviction. Following a hearing on appellant's motion to recall the sentence, the court reimposed the seven-year term.

B. *Factual Summary*

Oscar Mina was an undocumented worker who lived in Napa and worked in the grape fields. He attended school in Mexico until reaching the fifth grade.

Around 5:00 on the afternoon of March 28, 2008, Mina had been dropped off after work at a store parking lot near Pueblo and Jefferson Streets in Napa. Appellant was parked in her car. She pulled up next to Mina, said she was a "police woman" and showed him a piece of yellow paper with words written in English. Mina cannot read English.²

Appellant exited her car, took Mina by the upper arm, and put him in the front passenger seat. The doors were locked. He got into the car because appellant told him "she was police." Appellant was not wearing a uniform and her car was a "normal car" with no special equipment, but Mina had been told that "over here in the United States, here in California . . . they have different kinds of policemen, but I don't know that."

Appellant drove to Highway 29 and travelled south toward Vallejo. She spoke a little bit of Spanish and said she was going to "take a spin." Mina's cell phone rang but he did not answer it.

² Mina testified with assistance from a Spanish interpreter.

Appellant turned off the highway and stopped at a grape field. Mina had never been there before. She told Mina to get into the back seat and take his pants down or she would “call Immigration.” Appellant had her cell phone to her ear. Mina realized she was not a police officer when she asked him to remove his pants, but he complied because she said she was “gonna call Immigration.”

Mina said he could not remove his pants because he had a plastic artificial insert on his foot. He had “something wrong” with one of his feet that prevented him from running or walking quickly. Nonetheless Mina got into the back seat and first removed his shoes with the plastic insert and then took off his pants. Appellant opened the back door, pulled Mina’s pants from him and took them away. Checking his pockets, she found, and took, Mina’s cell phone and wallet,³ putting them in her own pocket. Appellant returned the pants to Mina, he put them on and got in the front seat as directed.

On the way back to town, appellant opened Mina’s wallet and said she was going to his bank so he could withdraw all his money. Appellant spoke to him using “a little Spanish.” Mina told her he had just opened the account and did not have any money in the bank. Mina also said that if she were “a policeman that it was better if we come back to—where there were other policemen.” Appellant said if she did that they would take more money from him. Mina replied that she was not a police officer.

They drove to a Wells Fargo ATM; appellant gave Mina his card. In all appellant and Mina had traveled 12 miles.

Faustino Deharo was standing at the ATM after finishing a transaction. Mina approached him and asked him to call the police because he was being robbed by appellant who was standing very close to him. Deharo asked him to make the call, but Mina said he did not have a phone because appellant had stolen it. Deharo described Mina as looking “[s]cared, sad” and his voice was a little shaky.

Appellant tried to grab the card, could not, and took off running. Mina shouted to Deharo to grab her. Deharo asked another customer to write down the license plate

³ In his wallet Mina kept his identification, \$500 in cash, a paycheck to him for around \$300 and his Wells Fargo bank card.

number. Deharo gave Mina a ride to the police station. Deharo testified that during the ride, Mina explained how appellant, posing as a police officer, asked him to get in the car and show her his wallet. She discovered he was doing illegal things and that is why they were going to the bank. At the bank Mina had suspicions and was going to call the police on his cell phone. At that point appellant took the phone and wallet and ran. Mina testified he did not tell Deharo anything about the incident.

At the police station Mina provided a written statement which paralleled, with minor variations, his testimony at trial. Officer Sedgley interviewed Mina, asking if he and appellant “had done any sexual acts.” Appellant explained that they had not, and did not tell her he would pay her for a sexual act.

Subsequently Officer Sedgley showed Deharo a photographic lineup; he pointed to appellant’s photo and said “that looks like her.” Mina could not make an identification.

Mina testified that no one offered him anything in exchange for his testimony.

Defense: Officer Sedgley stated that at the time of the incident, appellant was on parole and a warrant for her arrest was in the process of being issued. Thus, it would not be surprising for someone in those circumstances to run when someone threatened to call the police.

II. DISCUSSION

A. Standard of Review

Appellant is adamant that the evidence was legally insufficient to sustain the robbery conviction because the record is devoid of substantial evidence that the taking was accompanied by the use of force or fear. She asks that we modify the judgment to reflect a conviction of grand theft from a person. The judgment will stand.

The test is familiar: Addressing a challenge to the sufficiency of evidence, we must determine from the entire record whether a reasonable trier of fact could have found that the People sustained its burden beyond a reasonable doubt. Engaging in this task, we view the evidence in the light most favorable to the judgment and presume the existence of each fact that the trier could reasonably deduce in support of that judgment. “ ‘The test is whether substantial evidence supports the [conclusion of the trier of fact], not

whether the evidence proves guilt beyond a reasonable doubt.’ [Citations.]” (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) It is the exclusive province of the trial court or jury to assess the credibility of witnesses and the truth or falsity of facts informing that assessment. Hence, where substantial evidence supports the verdict, we do not substitute our evaluation of credibility for that of the fact finder, but rather give due deference to the trier’s findings. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Substantial evidence is evidence which is reasonable, credible, and of solid value. (*People v. Johnson* (1992) 5 Cal.App.4th 552, 558.)

B. Analysis

Our Penal Code defines robbery as “the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (Pen. Code, § 211.) The statute requires either force or fear, not both.

Our cases have not precisely defined the degree of force required to satisfy the force element of robbery. However, something more is called for beyond the quantum of force needed to accomplish the mere taking of the property from the victim. (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1258-1259.) In the present case, appellant used sufficient force to satisfy this element of robbery. After using the charade of being a law enforcement officer, appellant took Mina by the upper arm and escorted him into the car. She drove to some grape fields, stopped, and demanded that Mina take off his pants. Although he said he could not because of the plastic support, he complied, first taking off his shoes and then pants. Standing outside appellant opened the back door, “pulled” Mina’s pants from him and took them away. She removed his wallet and cell phone. That was the last Mina saw those items. Mina had a physical disability related to his feet, suggesting he was more vulnerable to force, and less able to resist. The jury properly may consider the victim’s physical characteristics in determining whether the physical act applied to the victim constituted force within the meaning of the robbery statute. (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709.) Taking the evidence in the light most

favorable to the judgment, appellant applied sufficient force when she pulled Mina's pants from his possession.

Appellant emphasizes that the incident did not leave Mina with any injury and the pants themselves were not damaged, either circumstance which would have supported an inference that appellant applied the force necessary to sustain the robbery conviction. Injury or damage is not required. In *People v. Garcia*⁴ (1996) 45 Cal.App.4th 1242, 1246, the defendant pushed against a cashier to move her out of the way so he could grab money out of the cash register. Apparently the defendant approached the cashier while the register was open, gave her "a slight push, 'like a tap,' on her shoulder with his shoulder." (*Ibid.*) Although the "defendant appears to have been rather polite in his use of force, giving the cashier a mere 'tap,' " the touching was more than incidental and not just the force needed to seize the money. (*Ibid.*) The same can be said for appellant's act of pulling Mina's pants from him and taking them away to seize his wallet and cell phone.

In any event, there was also substantial evidence that appellant used fear to accomplish the taking of Mina's property. Fear may be "fear of an unlawful injury to the person or property of the person robbed" (Pen. Code, § 212, subd. 1.) The element of fear is satisfied where there is sufficient fear to prompt the victim to comply with the unlawful demand for his or her property. (*People v. Davison* (1995) 32 Cal.App.4th 206, 212.) Fear may be inferred from the circumstances in which the crime is committed and the property taken. (*People v. Holt* (1997) 15 Cal.4th 619, 690.) It is enough if the evidence supports an inference that the victim in fact was afraid, and such fear allowed the offense to be accomplished. (*People v. Mungia, supra*, 234 Cal.App.3d at pp. 1709-1710, fn. 2.)

Appellant, posing as a law enforcement officer, took Mina by the arm and got him into her car. The doors were locked. She told him they were going for a spin. Mina's phone rang, but he did not answer it. Mina was an undocumented worker who spoke

⁴ Disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365 footnotes 2 and 3.

Spanish and had been in the United States for only a year. About six miles later they stopped at a field off the highway. Appellant ordered Mina to take off his pants and threatened to call “Immigration” if he did not. Mina complied even though it was difficult due to his physical limitation, which prevented him from running away. Mina said he was afraid and felt “bad” “as an immigrant.” Appellant took his wallet, with identification, as well as his cell phone.

A jury could infer the requisite fear of injury to person or property from these circumstances. Appellant had all the power—her car and her phone—to call “immigration”; and the familiarity of being in her own country and community. Mina was in unfamiliar territory, with a physical limitation. It would not be unreasonable to infer that appellant feared for his physical safety under these circumstances.

III. DISPOSITION

We strike the protective order and in all other respects affirm the judgment.

Reardon, Acting P.J.

We concur:

Sepulveda, J.

Rivera, J.